IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

PUGET SOUND POWER & LIGHT COMPANY, a corporation, and OLD COLONY TRUST COMPANY, a corporation, *Petitioners*,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY, a municipal corporation.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURT BELOW

The judgment of the United States District Court for the Western District of Washington, Northern Division, was entered August 24, 1940 (R. 159-162). The opinion (R. 1832), concurring opinion (R. 1851) and dissenting opinion (R. 1854) of the Circuit Court of Appeals appear in the record and at 123 F. (2d) 286. The judgment of the Circuit Court of Appeals was entered October 24, 1941 (R. 1877). No petition for rehearing was filed.

II.

JURISDICTION

The jurisdictional statement appears in the preceding Petition for Writ of Certiorari (*supra*, p. 5).

III.

STATEMENT

The essential facts are stated in the preceding Petition for Writ of Certiorari (*supra*, p. 1). Further facts regarding each point will be stated herein.

IV.

SPECIFICATIONS OF ERROR

1. The Trial Court erred in entering the Decree of Public Use and Necessity on July 31, 1939, because it affirmatively appears that the property sought to be taken is not necessary or required by the District.

2. The Trial Court erred in limiting the jury's consideration of an allowance for contractor's profit and expense in the estimate of present reproduction cost of property.

3. (a) The Trial Court erred in rejecting the testimony of S. P. MacFadden, Vice President of the Company, that the severance damage to the Bellingham office building would be $108,000.

(b) The Trial Court erred in striking the entire testimony of the Company's witness, O. C. Scudder, concerning severance damage to the Bellingham office building.

4. The Trial Court erred in reopening the District's case in chief after the close of the Company's evidence to permit the introduction of Resolution No. 37 of the District (R. 1742-1744) which offered to enter into a five-year contract with the Company for purchase of wholesale power at a rate subject to revision by the state regulatory body, and in overruling the Com-

pany's objection to such reopening and to the introduction of such resolution.

V.

ARGUMENT

1. There Is No Necessity for the District to Condemn the Property of the Company.

The District is a municipal corporation organized under the laws of the State of Washington for the purpose (*inter alia*) of selling and distributing electric power. Its territorial limits are coextensive with the boundaries of Whatcom County. On April 17, 1939, its commissioners adopted Resolution No. 24 declaring that the public interest, welfare, convenience and necessity required the establishment by the District of an electric public utility (R. 12). This resolution also declared the estimated cost of acquisition of the Company's property for that purpose to be $3,250,000 (R. 19, 20). On the same day the District adopted Resolution No. 25 authorizing certain attorneys to institute condemnation proceedings to acquire such property, and Resolution No. 26, specifically describing the properties to be condemned (R. 30, 34). All of the Company's easements, rights of way and highway franchises under which it operates its properties are included in the property to be taken (R. 17).

At the hearing on the District's application for a decree adjudging the taking to be a public use and necessity the only showing made by the District on the issue of "necessity" consisted of the above resolutions.

As stated by the Circuit Court of Appeals in the majority opinion (R. 1835):

> "The franchises of the company under which the Whatcom County properties are operated, are not exclusive franchises, and there is no legal obstacle to prevent appellee (District) from operating in the same territory. There is ample room on the highways for appellee (District) to construct another system, which could be built in about a year and a half at a cost not greater than the cost of acquiring the properties in question, according to some of the testimony herein."

The Company contended in the lower courts, and contends here, that the determination of the District commissioners as to the necessity for taking the Company's property was unreasonable and arbitrary. This contention the Circuit Court of Appeals summarily disposed of in the following language (R. 1838):

> "The company argues that the action of appellee (District) was arbitrary because it was unnecessary to take the properties since other competing lines could be built. The argument, however, ignores the fact that it could reasonably be concluded that it was necessary to take existing properties, thus avoiding competition, rather than to build new lines and be faced with competition. We think a reasonable man could take that view, and that therefore the decision of appellee's (District's) commissioners is not arbitrary."

The Supreme Court of the State of Washington has adopted the rule of "reasonable necessity," or as sometimes called, the rule of "comparative necessity."

> *State ex rel. Weyerhaeuser Timber Company v. Superior Court*, 71 Wash. 84, 88, 127 Pac. 591, 592.

Reasonable or comparative necessity means that where great damage will be done to the property owner with relatively little good to the taker, there is a lack of that legal necessity which the law requires.

> *Samish River Boom Company v. Union Boom Company*, 32 Wash. 586, 600, 73 Pac. 670.

Condemnation has been denied by the Supreme Court of Washington in each of the following cases upon the ground that no necessity was shown.

> *Seattle & Montana Railway Co. v. State of Washington*, 7 Wash. 150, 34 Pac. 551;
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> *State ex rel. Portland and Seattle Railway Co. v. Superior Court*, 45 Wash. 270, 88 Pac. 201;
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> *State of Washington v. Superior Court*, 128 Wash. 79, 222 Pac. 208.

In *State of Washington v. Superior Court*, 128 Wash. 79, 222 Pac. 208, *supra*, the state engineers laid out a state highway on a straight line close to a fruit cold storage warehouse, with the result that the warehouse lost much of its value. Without substantial injury to the proposed highway, it could have been routed farther away from the warehouse. Finding no actual fraud the court nevertheless found arbitrary selection of the route and denied the right of condemnation.

The evidence before the Court here shows without dispute that the property of the Company could be duplicated at reasonable cost and within less time than has already been consumed in prosecuting this condemnation proceeding. There is no legal reason

why the District cannot build its own system. On the other hand, it is proposed by this proceeding to put the Company out of business completely in Whatcom County. The District seeks to take approximately 10% of the Company's total customers or retail market but will leave on the Company's hands almost the entire generating capacity built to supply this market, thereby inflicting large severance damage.

The opinion of the Circuit Court of Appeals significantly points out that the real reason for taking the Company's property is to avoid competition. Such a purpose is nowhere expressed in the Washington statute under which the District was created (Rem. Rev. Stat., Sec. 11605, *et seq.*). A purpose to eliminate private capital from any field of enterprise, and to appropriate such field for a municipal corporation exclusively will not be presumed. Such a legislative intent must be clearly expressed. Moreover, monopolies are prohibited by the constitution of the state. Article XII, Section 22.

The Company also introduced evidence, which is uncontroverted, showing that numerous advantages inhere in the operation of a large unified system such as that owned by the Company. It is more economical to operate; it is able to render better and more continuous service; and most important, it is able to serve at reduced rates. These advantages are not possible in the operation of a single-county property as an isolated enterprise (R. 347, 348, 376-385). Dismemberment of the Company's system, as is being attempted by the Washington Public Utility Districts,

is a step backward economically and is not in the public interest (R. 385, 386).

Since the decision of the Circuit Court of Appeals, war has been declared by the United States on Japan, Germany and Italy and the Pacific Northwest has become one of the theaters of war. The Company's system is a vital defense industry serving numerous governmental and industrial customers directly engaged in the war effort and should therefore be preserved intact.

The disproportion between the benefit to the District on the one side and the damage and injury to the Company and the public generally on the other is so great, and the departure from the Washington rule of necessity is so apparent, that this case should be reviewed by this Court.

2. The Trial Court Erred in Instructing the Jury to Eliminate Contractor's Profit.

On the issue of market value of the property to be taken, both parties introduced evidence of the present cost of reproducing the property. The Company's main witness on this phase of the case was N. T. Veatch, Jr., who made his appraisal on the basis that the work would be performed by a general contractor. He explained why he did so as follows (R. 1147):

> "I used the plan of reproduction by contract because I feel certain that it would be the plan followed by any prudent company in reproducing the property. Any of the other plans would involve what would be equivalent to the contractor taking his first job and taking the job, the first

one, of some five million dollars of property. I don't believe that would be done by a prudent organization."

To the cost of labor and materials, Mr. Veatch added 10% for the compensation and expenses of the contractor and ¾ of 1% for contractor's bond. The witness testified that of the 10% approximately 4% would be required for the contractor's general expenses—his general office expense and his administration expenses—and that the remaining 6% would be profit (R. 1167, 1168, 1295-1298, 1329, 1331).

Inasmuch as his estimate of the total reproduction cost new was $5,356,711, his allowance for contractor's profit and expense amounted to about $500,000 (R. 1153-1154, 1292-1295).

Mr. Veatch testified that in his opinion construction by a contractor was more economical and that the net cost to the owner of the completed project would be less than if some other method were adopted (R. 1299-1302, 1319). He stated it to be the almost universal practice in projects of this size to have the work done by a general contractor (R. 1326-1328). The testimony on this point is more fully set out in the dissenting opinion of Judge Stephens (R. 1857-1861).

The Trial Court instructed the jury that "general contractor's profit and cost of his bond should be included only where the general contractor, if employed would effect corresponding savings to the owner on material and labor costs * * *" and directed the jury

to eliminate from the cost of reproduction estimates any such allowances not represented by such corresponding savings on material and labor (R. 1763). The effect of this instruction is well stated by Judge Stephens in his dissenting opinion (R. 1861, 1862) as follows:

> "The Court, however, in effect instructed the jury to disregard all testimony of the witness relating to the advantages of employing a general contractor for the work other than money savings, over the reproduction new cost without a general contractor and told the jury that the cost of reproduction new by contractor could include compensation to the contractor and cost of bond up to but not beyond the savings on material and labor that he was enabled to make over the reproduction new cost without a general contractor.
>
> "I am of the opinion that this constitutes reversible error. It takes away from the jury all consideration of the testimony to the effect that no prudent owner would construct the properties otherwise than by general contractor, and this in the face of Mr. Veatch's testimony that it is the universal custom to use a general contractor in all sizeable projects. It takes from the jury the question of whether the general contractor method was the only practicable method of construction and would be so considered with all of its elements of cost by the hypothetical willing parties to a purchase and sale."

The majority opinion of the Circuit Court of Appeals fails to meet squarely the issue of the correctness of the instruction but decides the point entirely on two other grounds, namely (1) that the objection made in

the Trial Court was insufficient, and (2) that the instruction was based on Mr. Veatch's testimony on cross-examination. As to ground (1), the majority disregarded the clearly sufficient exception taken by the Company to the instruction (R. 1789, 1790). In this connection Judge Stephens said (R. 1857):

> "I reject the suggestion that the instruction was not sufficiently excepted to."

As to ground (2), the majority opinion relies upon one sentence from the testimony of Mr. Veatch. As pointed out by Judge Stephens, this constitutes a misinterpretation of Mr. Veatch's testimony (R. 1857-1862).

In this fashion the Circuit Court of Appeals approved the instruction which required the jury to eliminate a substantial portion, if not entirely all, of the allowance of about $500,000 for contractor's profit, expenses and bond, included in Mr. Veatch's total appraisal. This is contrary to the holding of numerous decisions of courts and regulatory commissions that in a reproduction cost estimate it is proper to assume the project would be construed by a general contractor and to allow for all elements of cost including a reasonable sum for contractor's profit and expenses. Among such decisions are the following:

Cary v. Corporation Commission of Okla. (3-Judge D.C., Okla.) 17 F. Supp. 772;

Brooklyn Borough Gas Co. v. Prendergast (3-Judge D.C., N.Y.) 16 F. (2d) 615;

Worcester Electric Light Co. v. Attwill (D.C., Mass.) P.U.R. 1929B 1.

3. The Trial Court Erroneously Rejected Testimony Offered by the Company to Prove Severance Damage to the Bellingham Office Building.

The Company owns a building known as the office building in Bellingham, which the District is not seeking to condemn. The Company claims severance damage in the sum of $108,000 by reason of being left with this specially constructed building after the taking of the rest of the Whatcom County properties of the Company. Two witnesses, S. P. MacFadden, Vice President of the Company, and O. C. Scudder, Bellingham realty dealer, gave testimony for the Company on this issue but their testimony was stricken by the Trial Court. There was no other testimony on this point.

It should be noted that neither of the courts below questioned the propriety of the allowance of this item of $108,000 for severance damage. The Circuit Court of Appeals followed its prior ruling in *Puget Sound Power & Light Co. v. City of Puyallup*, 51 F. (2d) 688, which was another condemnation case involving a different part of this same company's system, holding that the company is not only entitled to the "market value of the property taken" but is also entitled to "the damage to its remaining property due to the severance of the property taken" (51 F. (2d) 689). The Trial Court said with respect to this item (R. 1624):

> "What the District is taking in this suit is the system of Whatcom County. Now that system today includes the ownership, operation and maintenance of a building specially built and designed and at all times operated for the particular pe-

culiar service of this system which is being taken. All of the remainder, substantially all of the remainder of the system is being taken except that building. *It is an inescapable inference from all of the evidence in this case that the company will sustain some substantial damages, * * * in the nature of severance damage growing out of the fact that it is left with that specially constructed, specially operated, specially maintained building carved out of that system and left on the respondent company's hands.*" (Italics supplied)

a. *Testimony of S. P. MacFadden*

Mr. MacFadden is Vice President in general charge of all operations of the Company (R. 1351). He testified that in his opinion the severance damage to the Bellingham office building would be $108,000 (R. 1455), but this testimony was stricken upon the ground that he had not shown himself to be qualified to testify to real estate values in Bellingham (R. 1458, 1466, 1468).

The striking of his testimony was erroneous because Mr. MacFadden was clearly qualified to give his opinion on the subject. As Vice President in general charge of all operations of the Company, he occupied the position of owner and therefore need not otherwise qualify in order to give testimony with respect to severance damage to Company property.

Weber v. West Seattle Land & Improvement Co., 188 Wash. 512, 63 P. (2d) 418;

Wicklund v. Allraum, 122 Wash. 546, 211 Pac. 760;

Alaska-Juneau Gold Mining Co. v. Larson (C.C.A. 9) 279 Fed. 420.

In upholding the action of the Trial Court, the Circuit Court of Appeals refused to apply the Washington law as expressed in the foregoing decisions, asserting that the witness gave not his own opinion but that of experts. It is true that Mr. MacFadden employed two real estate experts to assist him in estimating the severance damage to the office building (R. 1463, 1464), but this does not disqualify him from testifying on the subject.

Mr. MacFadden said at one point (R. 1463-1464):

> "I had two competent real estate men determine the figure of $108,000 for me *and after going over it, I agreed it was the proper figure.*" (Emphasis supplied)

Again, he testified with respect to the assistance given him by the real estate experts (R. 1464):

> "Q. Does that serve as the basis of your opinion?
>
> A. Yes, sir, *that and my knowledge of the situation.*" (Emphasis supplied)

For Judge Stephens' dissent on this point, analyzing the evidence, see R. 1870-1872.

b. *Testimony of O. C. Scudder*

O. C. Scudder had been in the real estate business in Bellingham for over twenty years and was generally familiar with the market value of real estate in Whatcom County (R. 1093-1099). In his opinion, the depreciation in market value of the office building by reason of the taking of the remainder of the Whatcom County system of the Company was $108,000 (R. 1583-1585). He explained in detail the special construction features which made the building useful

only as headquarters for the company's electric operations in that district. He stated there was almost no commercial purpose that the major portion of the building could be used for other than its present use (R. 1586-1600).

On cross-examination, Mr. Scudder testified that he had arrived at the $108,000 figure by capitalizing the estimated loss of rental value of $6,480 at 6% (R. 1591, 1610). On redirect examination, he testified that this method is generally followed by members of the real estate profession (R. 1615).

The entire testimony of Mr. Scudder was stricken (R. 1625, 1626) and this ruling of the Trial Court was sustained by the Circuit Court of Appeals for the reason that "Scudder's testimony did not comply with the approved method of proof of damages authorized by the law of Washington in condemnation proceedings" (R. 1841). The Court apparently was of the opinion that the witness must state the value before and after the taking, but cannot himself make the subtraction and testify only to the difference.

The Washington rule is that a witness, if properly qualified, may state how much, in his opinion, the property would be depreciated in value by the taking, without stating the value before and after the appropriation.

Seattle & M. Ry. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 738;

Ingram v. Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34;

King County v. Joyce, 96 Wash. 520, 165 Pac. 399.

The courts below refused to follow the rule of these Washington decisions. Judge Stephens, in his dissenting opinion, fully discusses this point (R. 1862-1870).

4. The Trial Court Erred in Admitting the District's Offer of Wholesale Power Contract.

That a large, integrated public utility system suffers a severance damage when a portion thereof is condemned has been conceded by counsel for the District throughout this proceeding. The owner's right to compensation therefor is recognized in the Federal Courts.

Monongahela Navigation Co. v. U. S., 148 U.S. 312, 326;

U. S. v. Gettysburg Elec. Ry. Co., 160 U.S. 668;

U. S. v. Powelson (C.C.A. 4) 118 F. (2d) 79, 86;

Puget Sound Power & Light Company v. City of Puyallup (C.C.A. 9) 51 F. (2d) 688.

Three District witnesses estimated severance damage, such estimates being in the neighborhood of $100,000 (R. 821, 955, 1005, 1019). Three Company witnesses were of the opinion that the severance damage would be around $2,000,000 (R. 1454, 1665-1680). One of the major considerations of witnesses on both sides was the probability or lack of probability that the District would buy electric power wholesale from the Company after severance—the District witnesses assuming that the District would continue to do so, and the Company witnesses being of the contrary opinion.

Toward the conclusion of the trial and after the District had closed its case in chief the commissioners of the District adopted a resolution offering to enter into a five-year wholesale power contract with the Company at a rate to be subject to revision by the State regulatory body (R. 1744). Over the Company's objection the District's case in chief was reopened and the resolution was introduced in evidence for consideration by the jury (R. 1741-1745). The purpose was to minimize the jury's award for severance damage. The Circuit Court of Appeals sustained this ruling in these words (R. 1842):

> "Evidence of this nature is admissible. *Puget Sound Power & Light Co. v. City of Puyallup*, 9 Cir., 51 F. (2d) 688, 696. Compare *State ex rel. Peabody v. Superior Court*, 77 Wash. 593, 138 Pac. 277."

The *Puyallup* case referred to merely held that the "probability or possibility" that the condemnor might buy power from the Company could be considered by the jury. It did not involve an offer by the condemnor to enter into a contract to buy power, as does the instant case.

The Circuit Court of Appeals has erroneously interpreted and applied the law of the State of Washington. The "just compensation" to which the owner is entitled must be paid in *money*.

> Washington Constitution, Art. I, Sec. 16;
>
> *State ex rel. Peabody v. Superior Court*, 77 Wash. 593, 613, 138 Pac. 277.

The owner cannot be compelled, against his will, to accept any substitute in lieu of money. An executory

promise by the condemning party in favor of the owner, which has the effect of diminishing or mitigating severance damage, is not admissible in evidence and cannot be considered in reduction of any compensation to which the owner would otherwise be entitled.

Lewis, Eminent Domain, Sec. 756;
State ex rel. Peabody v. Superior Court, 77 Wash. 593, 613, 138 Pac. 277;
In re Seattle, 102 Wash. 286, 288, 172 Pac. 1161;
Blomskog, Erickson & Cotton v. Seattle, 107 Wash. 471, 473, 182 Pac. 571;
Board of Directors of St. Francis Levee District v. Webb (C.C.A. 8) 188 Fed. 67.

In *State ex rel. Peabody v. Superior Court*, 77 Wash. 593, 138 Pac. 277, *supra*, the Washington Supreme Court held that an offer by the city condemnor to grant certain rights to the owner of a street railway after condemnation of a portion thereof could not be considered by the jury on the issue of the amount of severance damages which would be suffered by the owner, and that consideration of such an offer by the jury would be "clearly inimical to the constitutional provision prohibiting the making of compensation for property taken other than in money" (77 Wash. 615). The Court further said (77 Wash. 615, 616):

> "The whole of the property is taken, not a part merely, and the part taken fixes the measure of the compensation. The amount of such compensation cannot be lessened by a tender of something the Railway may not want, and which it must pay for if accepted."

Board of Directors of St. Francis Levee District v. Webb (C.C.A. 8) 188 Fed. 67, *supra*, was a condemnation proceeding brought by the levee district. One of the issues was the amount of damage for obstruction of natural drainage to the remainder of the property which would be caused by the construction of the levee. At the close of evidence the district filed in open court a written offer and agreement to improve the drainage and to permit the court to enter appropriate orders enforcing the obligation. The Eighth Circuit Court of Appeals held that the issue was properly withdrawn from the jury and said (188 Fed. 68):

> "The offer of the levee district was properly disregarded. It does not appear that the plan according to which the condemnation proceeded and the levee was built specified as part thereof permanent means of draining the land. The condemnation was not qualified or limited in that way. When the case was tried the landowner was entitled to an assessment of his damages in money, not in obligations or promises possibly productive of future litigation."

The Circuit Court of Appeals below recognized the probable conflict between its holding and that in the *Peabody* case when it used the word "compare." The Ninth Circuit has refused to follow the Washington law as established in the foregoing decisions and is in conflict with the Eighth Circuit Court of Appeals, as above indicated.

CONCLUSION

The Circuit Court of Appeals has rendered a two to one decision on a matter of great importance to the people of the State of Washington. The decision is in conflict with decisions of other circuit courts of appeals and the courts below have failed to follow the law of the State of Washington as set forth in the State Constitution and decisions of the Supreme Court of the State of Washington. Clearly this calls for an exercise of this Court's power of supervision.

It is respectfully submitted that the Petition for Writ of Certiorari to review the decision of the Circuit Court of Appeals for the Ninth Circuit should be granted.

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